Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1135

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

v.

CARL EDWIN WIGGINS,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF IN OPPOSITION

Craig Smyser
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2730

Court-appointed Counsel
for Respondent

OF COUNSEL:

Paul E. Stallings
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2354

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Brief in Opposition	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Denying the Writ	6
I. The Fifth Circuit Decision Correctly Applied Faretta	6
II. The Decision Below Turned on the Facts	10
Conclusion	12
Certificate of Service	12

TABLE OF AUTHORITIES

CASE	PAGE
Brown v. Wainwright, 655 F.2d 607 (5th Cir. 1982). . .	9
Faretta v. California, 422 U.S. 806 (1974)	2,6,7,8,10, 11
Wiggins v. Estelle, 520 S.W.2d 780 (Tex.Civ.App. 1975).	1,6
Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982) . . .	1,2,7,8,11
Wiggins v. Estelle, 691 F.2d 213 (5th Cir. 1982) . . .	1

NO. 82-1135

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

v.

CARL EDWIN WIGGINS,

Respondent

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Carl Edwin Wiggins, respectfully requests that the Court deny the petition for writ of certiorari.[1]

OPINIONS BELOW

The decision of the Texas Court of Criminal Appeals on direct appeal is Wiggins v. Estelle, 520 S.W.2d 780 (Tex.Civ.App. 1975). The findings and recommendation of the United States Magistrate, adopted by the District Court on August 26, 1980 are reproduced in Petitioner's Appendix C to the Petition for Writ of Certiorari. The panel opinion of the United States Court of Appeals for the Fifth Circuit reversing the denial of habeas corpus relief is Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982) and is reproduced in Petitioner's Appendix B. The Opinion on Denial of Rehearing and Suggestion of Rehearing En Banc is Wiggins v. Estelle, 691 F.2d 213 (5th Cir. 1982) and is reproduced in Petitioner's Appendix A.

---

[1] Craig Smyser, appointed by the Fifth Circuit under the Criminal Justice Act to represent Respondent on appeal, submits this Brief in Opposition. Attached hereto as Appendix A is Respondent's pro se response entitled "Supplemental Brief of Respondent on Jurisdiction."

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 1982. The United States Court of Appeals for the Fifth Circuit denied Petitioner's Motion for Rehearing and Suggestion of Rehearing En Banc on November 8, 1982.

QUESTION PRESENTED

DID THE FIFTH CIRCUIT CORRECTLY APPLY THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, 422 U.S. 806 (1974) WHEN IT HELD THAT THE UNWANTED PARTICIPATION OF STANDBY COUNSEL, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVED RESPONDENT OF HIS SIXTH AMENDMENT RIGHT TO CONDUCT HIS OWN DEFENSE?

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The basic facts of this case are set forth in the panel opinion, Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982):

> The circumstances surrounding the crime are easy to relate. In the early evening of January 17, 1972, a man wielding a rusty pistol robbed a Piggly Wiggly store in San Antonio. After having the cashier stuff the day's proceeds into a brown paper bag, the robber fled the store and drove away in his car. Before driving away, however, a second store employee managed to see the thief's license plate number and wrote it down in the palm of his hand. That number was later traced to the appellant, Carl Wiggins.
>
> After a few false starts,[3] Wiggins was indicted and subsequently brought to trial. Before trial commenced, however, appellant requested that he be permitted to conduct his own

---

[3] Footnote omitted.

defense. The court granted that request, but at the same time appointed two attorneys as standby counsel.[4]

The conduct of these attorneys during the course of the trial is the core of appellant's argument that he was denied his Sixth Amendment right of self-representation. While the court made it clear that counsel were present for advisory purposes only,[5] it was not long before one of the attorneys began to take on a more active role. Soon Wiggins began to protest against standby counsel's unsolicited participation, claiming that it prohibited him from

---

4. DEFENDANT: Your Honor, I am defending myself and I feel that relative to the motions that I filed, that they can be heard without the transcript.

MR. SAMPLES: Your Honor, there has -- an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.

THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for counsultation [sic] and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.

Now, as I understand the law, he has a right to represent himself as long as he does that within the framework of the law and the rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

....

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behind him.

You may proceed.

Record, vol. I, at 12-14.

5. Id.

conducting his own defense.[6] The court's response was that defendant was going to receive counsel's aid whether he wanted it or not.[7] When defendant later requested that the court at least instruct standby counsel not to take the initiative, the court refused.[8] Thereafter, counsel continuously participated in the proceedings, both in and outside the presence of the jury. In addition to making objections too numerous to cite, counsel on

---

6. MR. GRAHAM: Again, Your Honor, we certainly believe that the arrest of the defendant's son, because of the, because of the --
DEFENDANT: Your Honor, the defendant's son was not arrested.
THE COURT: Wait a minute.
DEFENDANT: Your Honor, I would like to defend myself. I would appreciate it, sir, if you would ask this man to let me defend myself.
MR. GRAHAM: Certainly. Help yourself.
DEFENDANT: I would be grateful. I have not solicited his assistance, Your Honor, and I don't want it.
Id. at 39.

7. THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.
DEFENDANT: Yes sir. I am not a lawyer.
THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.
DEFENDANT: Yes sir.
THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.
DEFENDANT: Yes sir.
THE COURT: You will have every right made available to you under the law, as this Court is able to determine.
DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's defense, well, then, I couldn't appreciate that.

Id. at 40-41.

8. THE COURT: All right. Mr. Wiggins, what is your pleasure. Mr. Graham here was appointed just two days ago as additional counsel. The law provides that when an attorney is appointed to represent someone, he shall have ten days time in which to prepare. You have had one attorney, though, that has been available to you and has had a month and a half to prepare, but you wish to proceed at this time?
DEFENDANT: Yes, Your Honor, I do.
....
THE COURT: You are waiving the ten days as far as Mr. Graham is concerned?

several occasions cursed,[9] argued with defendant,[10] and moved for mistrial against the defendant's wishes.[11] By the time the smoke cleared, Wiggins had been convicted and sentenced to life imprisonment as a recidivist.

---

8. (cont.)

DEFENDANT: Yes, Your Honor.
THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?
DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistance, if I may.
THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.
DEFENDANT: Yes sir, but I would ask the Court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?
THE COURT: Well --
DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.
THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.
DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?
THE COURT: His availability, yes.
DEFENDANT: May I except to that, Your Honor?
THE COURT: It's in the record.

Id. at 65-67.

9. One example of this occurred when Wiggins was examining a witness during voir dire:

DEFENDANT: I want to ask him this question here on this statement that's dated February 15. May I show it to you?
MR. GRAHAM: God damn it. Wait a minute. I am trying to get ...
(Thereupon, Mr. Graham conferring with defendant.)

Id. at 215. See also Record, vol. II, at 422.

10. The following is representative:

DEFENDANT: Your Honor, I have some questions relative to the in-Court --
MR. GRAHAM: We will take him on cross-examination.
DEFENDANT: I would like to ask him. They are very relevant.
MR. GRAHAM: You can get him on cross-examination. Sit down.

Record, vol. I, at 223.

11.

MR. GRAHAM: Notwithstanding the Court's instruction, I am sure it is so prejudicical as to require a mistrial.
DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel --
THE COURT: I denied the motion for mistrial. Overruled.

> Little time was lost before Wiggins began running the gauntlet of direct appeal,[12] petitions for state writ of habeas corpus,[13] and a petition to the Supreme Court for writ of certiorari. When these routes proved unfruitful, Wiggins undauntedly applied for federal habeas corpus relief.[14] The district court disposed of the petition by adopting the recommendations of the federal magistrate to whom it had been referred. This appeal followed.

The Fifth Circuit panel reversed the decision of the district court and remanded the case for the granting of the writ of habeas corpus. The United States Court of Appeals for the Fifth Circuit denied Petitioner's request for rehearing and rehearing en banc.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit Decision Correctly Applied Faretta.

The Fifth Circuit held that Respondent's constitutional right to represent himself was violated by the excessive participation of standby counsel. This holding does not extend Faretta. The opinion amounts to nothing more than a restatement of Faretta: the Sixth Amendment provides an accused the right to present his defense without the

---

11. (cont.)
MR. GRAHAM: Jesus Christ.
Record, vol. II, at 422. See also Record, vol. II, at 345-46, 498-99, 512-14 and 539-40.

12. Wiggins v. State, 520 S.W.2d 780 (Tex.Civ.App. 1975).

13. Wiggins filed five petitions for state habeas corpus relief and hundreds of pages of various pleadings in the state courts. His first two applications were filed while his direct appeal was pending. The next two applications were denied by the Texas Court of Criminal Appeals on October 15, 1975, and May 3, 1978. On January 10, 1979, appellant's fifth application was denied; he was also found to have abused the writ.

14. Six separate points of error connected with his trial and conviction were alleged, together with two points of error connected with his appeal from that conviction. See note 1 supra.

undesired interference of a lawyer. As the Court said in Faretta, an unwanted counsel represents an accused only through a "tenuous and unacceptable legal fiction." Id. at 821. Respondent repeatedly asked the court to relieve him of counsel's services, but although the court asked counsel to remain as a standby, counsel participated as if he were in fact conducting the trial. In addition to making many objections, counsel cursed, argued with Respondent, and moved for a mistrial. Wiggins v. Estelle, 681 F.2d at 270. The conduct of counsel in this case constituted unwanted representation, clearly prohibited by Faretta; consequently, this case does not clearly present the question of what latitude a court should allow standby counsel but only presents the question already decided by Faretta: does a defendant have to accept representation by a lawyer.

Petitioner's Petition for Writ of Certiorari mischaracterizes the Fifth Circuit decision as one which "establishes a rule which would totally bind the hands of a trial judge" because "standby counsel would be absolutely prohibited from speaking up in the pro se defendant's behalf, no matter what the circumstances, unless the defendant requested him to do so." Petition for Writ of Certiorari at 9. In support of this position, Petitioner quotes a clause from the Fifth Circuit opinion -- "the rule we establish today is that court-appointed standby counsel is 'to be seen, but not heard.'" Petition for Writ of Certiorari at 8. The court elaborated on that clause, however, in its next sentence: "By this we mean that he [standby counsel] is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit." Wiggins v. Estelle, 681 F.2d at 273.

[footnotes omitted.] The court points out in a footnote to this passage that standby counsel may draw the trial court's attention to some legal problem or question in the case, and the trial court, in turn, may request that defendant consult with counsel. Id. at n. 24. The Fifth Circuit's decision does not, therefore, "totally bind the hands of a trial judge confronted with a defendant exercising his Faretta right." Rather, it provides admirably clear guidelines for bench and bar. Moreover, as both Faretta and the Fifth Circuit note, the trial judge may order standby counsel to assume the defense of the case if the accused acts improperly. Faretta at 834, n. 46, Wiggins v. Estelle, 681 F.2d at 271, n. 17, 273, n. 23.

Contrary to Petitioner's assertion, the Fifth Circuit's delineation of the proper role of standby counsel comes straight from Faretta. Faretta held that "a State may -- even over objection by the accused -- appoint a 'standby counsel' to aid the accused if and when the accused requests help." Faretta, at 834, n. 46. [emphasis added]. In this case, the accused specifically requested that counsel not aid him; the Fifth Circuit, following Faretta, held only that when an accused does not request standby counsel's aid, standby counsel should not inject himself into the proceedings.

Petitioner warns that, under the Fifth Circuit's rule, standby counsel may overstep his role even when he calls attention to a violation of the accused's constitutional rights. Petition for Writ of Certiorari, at 10, n. 3. This case does not present that problem. Moreover, there is an easily definable difference between interrupting an accused because counsel believes he can cross-examine a witness more skillfully and pointing out to the court and the accused a potential constitutional violation. The harmless error rule

adopted by the Fifth Circuit recognizes and makes provision for this distinction.

The Fifth Circuit did not hold that interjections by standby counsel create a "presumption of prejudice" as Petitioner contends. Petition for Writ of Certiorari at 11-14. Under the Fifth Circuit's decision, standby counsel is to assist the accused when asked to do so; if standby counsel acts on his own, his conduct will be evaluated according to a harmless error standard. This is not equivalent to a "presumption of prejudice." Instead, when the accused's constitutional right to defend himself is violated by the unsolicited action of standby counsel, the court proceeds to the next step in the analysis to determine whether the violation was harmful. The Fifth Circuit offered guidelines for this analysis -- for instance, strict scrutiny of statements made in the presence of the jury -- but left room for a judicial determination whether, under the circumstances of a particular case, the statements actually prejudiced an accused's presentation of his defense.

The Fifth Circuit rule is commendably simple. Standby counsel knows the advisory nature of his or her role. The trial court understands what to expect and how to instruct standby counsel. The accused may then present his defense.

Petitioner cites no case in any other circuit that conflict with the Fifth Circuit's decision. Although Petitioner contends that the holding in this case is inconsistent with Brown v. Wainwright, 655 F.2d 607 (5th Cir. 1982) (en banc), the Fifth Circuit's denial of rehearing en banc indicates that the Fifth Circuit finds no conflict between the panel opinion in the instant case and its en banc decision in Brown. Furthermore, as Petitioner acknowledges, Brown involved a different issue, the question of

whether an accused, once he asserts the right to self-representation, can waive the right. Clearly, this case does not concern waiver. Throughout his trial, Respondent consistently asserted his desire to conduct his defense without assistance from standby counsel. Unless an accused must declare his wish to represent himself each time he speaks, an absurd suggestion, it is difficult to imagine a more vigorous effort to assert the right of self-representation than occurred here.

II. The Decision Below Turned on the Facts.

The Court should not grant the writ in this case because it presents no unusual or special question of law. Standby counsel conducted himself so outrageously in the trial of this case, that under any circumstances, even if Respondent had accepted this counsel as his court-appointed representative, this Court would not permit this conviction to stand. See Faretta v. California, 422 U.S. 806, 836-37, n. 1 (1974) (Burger, C.J. dissenting). Respondent at trial clearly expressed his dissatisfaction with standby counsel and complained that standby counsel impaired his defense. Standby counsel's repeated interruptions and cursing are instances of overbearing conduct which should not be permitted. Id.

This case does not present the problem, reserved by Faretta, of a defendant complaining that he sacrificed a constitutional argument when he conducted his own defense. Id. at 834, n. 46; Id. at 846, n. 7 (Burger, C.J. dissenting). This is a case where standby counsel, against the wishes of Respondent, adopted trial strategy that significantly and adversely affected Respondent's

constitutional right to present his own defense. Id. at 848 (Blackmun, J. dissenting). It is a case "where distrust, animosity or other personal differences between the accused and his would-be counsel" rendered effective conduct of the defense impossible. Id.

No counsel, standby, court-appointed or privately retained, should be permitted to say to his client, as standby counsel did in this case during voir dire: "God damn it. Wait a minute." Wiggins v. Estelle, 681 F.2d 266 at 270, n. 9. (5th Cir. 1982). No counsel should be permitted to curse or use abusive language during court proceedings as standby counsel did here. Id. Excoriation of such conduct blazes no new constitutional ground; it only admonishes counsel to perform their duties with a minimum of decency and regard for their clients.

As Chief Justice Burger and Justice Blackmun noted in their dissenting opinions in Faretta, this Court has long been an enemy of overbearing conduct on the part of trial counsel. Faretta, 422 U.S. at 836 n. 1; 848 (Burger, C. J. and Blackmun, J. dissenting). Although the conflict here arose between standby counsel and a defendant who asked to represent himself, the Fifth Circuit's decision only represents a continuation of this Court's condemnation of a counsel's unseemly and overbearing conduct. Because the facts of this case so clearly call for the result reached by the Fifth Circuit, this Court should decline to grant Writ of Certiorari.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VINSON & ELKINS

By: Craig Smyser

Craig Smyser
First City Tower, Suite 3123
Houston, Texas 77002
(713) 651-2730

Court-appointed Counsel
for Respondent

OF COUNSEL:

Paul E. Stallings
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2354

CERTIFICATE OF SERVICE

I DO HEREBY certify that a copy of the foregoing Brief in Opposition was served on opposing counsel by mailing a copy of same, certified mail, return receipt requested or hand delivering same, on the 7th day of February, 1983. Notice was further given that the original of same was being filed with the Clerk of the aforementioned Court.

Craig Smyser

Craig Smyser

Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W. J. ESTELLE, JR., Petitioner

v.

CARL EDWIN WIGGINS, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Carl Edwin Wiggins, who is now held in a Texas state prison, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The undersigned counsel was appointed under the Criminal Justice Act by the United States Court of Appeals for the Fifth Circuit to represent Respondent in his appeal to the Fifth Circuit, thus allowing Respondent to invoke the provisions of 18 U.S.C. §3006(A)(d)(6), relieving him of his requirement that he file a signed affidavit supporting this motion.

Nonetheless, Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Craig Smyser
Counsel for Respondent,
Carl Edwin Wiggins

VINSON & ELKINS
First City Tower, Suite 3123
Houston, Texas 77002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W. J. ESTELLE, JR., Petitioner

v.

CARL EDWIN WIGGINS, Respondent

AFFIDAVIT

BEFORE me, the undersigned authority, on this day personally appeared Craig Smyser, who being by me first duly sworn did depose and say as follows:

I am over twenty-one (21) years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts stated herein.

I, the affiant, am attorney for the Respondent in the above entitled and numbered cause. I am duly licensed to practice law in the courts of the State of Texas, have held that license in good standing for more than two (2) years. I was appointed to represent Respondent under the Criminal Justice Act by the United States Court of Appeals for the Fifth Circuit. As I am not yet eligible to be admitted to the Bar of the United States Supreme Court, Paul Stallings, who is a member of the Bar, has agreed to appear "Of Counsel" on any pleadings that need to be filed in this court until such time as I am able to become a member of the Bar of the United States Supreme Court.

I hereby certify that on this 7th day of February, 1983 three copies of the Response to Petition for Writ of Certiorari, and one copy of the Motion for Leave to Proceed

In Forma Pauperis and Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis were mailed by certified mail, return receipt requested, postage prepaid, to each of the following persons: Gilbert J. Pena and Leslie A. Benitez, Assistant Attorneys General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for Petitioner. I further certify that all parties required to be served here have been served.

Craig Smyser

Craig Smyser

STATE OF TEXAS §
§
COUNTY OF HARRIS §

SUBSCRIBED and sworn to before me, a Notary Public, this 7th day of February, 1983.

Rhonda J. Goodson

(SEAL)

Notary Public in and for Harris County, T E X A S

RHONDA J. GOODSON
My Commission Expi

My Commission Expires:
9-5-84

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
* * * * * * * * * * * * * * * * *

NO. 82-1135

W.J. ESTELLE, JR.,

Petitioner

VS

CARL EDWIN WIGGINS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 45 of the Rules of this Court, Motion is hereby made that the Respondent be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit. Leave to proceed in forma pauperis has been sought in the Court below and granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the Office of the Attorney General of Texas, at P.O. Box 12548, Austin, Texas 78711, on this the 25th day of JANUARY, 1983.

RESPECTFULLY SUBMITTED

Carl Edwin Wiggins

Carl Edwin Wiggins, Respondent
P.O. Box 32 - 241697
Huntsville, Texas 77340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W.J. ESTELLE, JR.,
Petitioner

VS

CARL EDWIN WIGGINS ,
Respondent

A F F I D A V I T

I, Carl Edwin Wiggins, being first duly sworn according to law, depose and say, in support of my Motion For Leave to proceed without being required to prepay costs of the fees:

(1). I am the Respondent in the above entitled case.

(2). I am presently incarcerated in the Texas Department of Corrections and have no means of obtaining money to pay the costs or fees involved in this case that has been initiated in this Court by the Petitioner.

(3). I have no savings and because of my poverty I am unable to pay the costs of this cause.

(4). I am unable to give security for the same.

(5). I believe I am entitled to the redress I seek.

(6). I was forcefully and fraudulently convicted of a crime that I did not commit.

(7). The nature of this case is briefly stated as follows:

I was arrested at my home in Corpus Christi, Texas on February 20, 1972, and charged with the alleged offense of robbery that allegedly occured in San Antonio, Texas, on January 17, 1972. Subsequently, after being held in the Bexar County Jail for 3 months, the charge was dismissed and I was released. I then set out to file suit against certain parties involved in my arrest and imprisonment, because of the tremendous amount of damages caused my family; my wife who was seven months

pregnant and had to be hospitalized; and the fact that I was not guilty of any offense whatsoever. Consequently I was rearrested and placed in jail again and again charged with the same offense. From that point I was kept in jail for more than two (2) years, despite my pleas for a speedy trial, and was indicted and reindicted a total of four (4) times on the same charge. On March 23, 1973, the charge was again dismissed and I was ordered released. I was not released, however, but was placed back in jail and the following week I was presented with two (2) more indictments charging the same alleged offense. During the course of these prosecutions several court appointed lawyers were forced on me, against my will, who openly acted to undermine my efforts to defend from the accusation. I learned as early as November, 1972, that the lawyers were deliberately working to assist the prosecution under pretense of "defense counsel." I testified at two pre-trial hearings about the conduct of these lawyers, December 7, 1972 and January 11, 1973, and asserted my right to defend myself without any lawyers. The trial judge ruled that I was going to have the lawyers whether I liked it or not. I was convicted only because I was deprived of defense witnesses; the State failed to process my subpoena applications; and because the lawyers, under pretense of "defense counsel," actively assisted the prosecution and interfered with my efforts to defend myself. One of the two lawyers forced on me entered my case for the first time on the same day trial started. It was this lawyer who interfered so much during trial. I had never seen him in my life until the day trial started.

After conviction I gave notice of appeal and pleaded that no lawyer represent me on appeal; that I be allowed to prosecute my own appeal. About a year later, after much difficulty trying to obtain a record, I filed my appeal brief. A month after I filed my own appeal brief, a court appointed lawyer

filed a brief "On behalf of the Appellant." The Court of Criminal Appeals, within ninety days of filing the briefs, treated the court appointed lawyers' brief as representation of my appeal; ignored the grounds raised in my brief; and affirmed the judgment. This procedure completely nullified my appeal to the Texas Court of Criminal Appeals.

Finally, without any lawyers, I returned to the State courts with applications for writ of habeas corpus, reurging the grounds, and all such applications were denied without hearing and without written opinions. In July, 1975, I filed a petition for writ of habeas corpus pursuant to Title 28 USC 2254, etc., in the United States District Court for the Western District of Texas, San Antonio Division, raising, among other grounds, the forced court appointed lawyer issue, and in 1977, Judge D.W. Suttle of that court issued an order of recusal which resulted in my case being transferred to Judge John Wood. Judge Wood dismissed that petition "for failure to exhaust state remedies" in August, 1977. I returned to the state courts with additional applications for writ of habeas corpus, urging again the same issues, and was cited for "abuse" of the writ. A Petition For Writ of Certiorari was requested from this Court and denied as Number 78-5151 in November, 1978. Then I filed a second petition for writ of habeas corpus pursuant to Title 28 USC 2254 in the United States District Court for the Southern District of Texas, Houston Division, and that petition was transferred, with suggestion for hearing, to the Western District in San Antonio, Texas and docketed there as No. SA-79-CA-128. The Petition was denied without a hearing and appeal was taken to the United States Court of Appeals for the Fifth Circuit; docketed as No. 80-2278. On July 26, 1982, a three Judge Panel reversed the judgment and the Respondent filed for this Court's review in a petition for writ of certiorari to which I now must respond.

Carl Edwin Wiggins

Carl Edwin Wiggins, Affiant

STATE OF TEXAS)
)
COUNTY OF WALKER)

The foregoing duly witnessed and sworn to before me, a NOTARY PUBLIC, on this 25th day of January, 1983.

ORIGINAL NOTARIZED
NOTARY PUBLIC IN AND FOR
WALKER COUNTY, TEXAS